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[EXCERPT DOCKET SHEET]

In the Circuit Court in and for the Eleventh Judicial Circuit Court, Dade County, Florida

The State of Florida,

vs. No. 73-1860

Steven Henry Roberts

* * *

January 28, 1980 "Discovery"

* * *

Date	Jan. 23, 1980	Jan. 28	March 13, 1980 . . .
State	D. Siegel	do	A. Barnes . . .
Defense	W. Aaron P.D.	do	S. Marks . . . . .

* * *

March 13, 1980 the following proceedings were had on this Cause for a probation violation hearing. Rule invoked.

[State witnesses; exhibits; State rests].

[Defense witnesses; Defense rests].

Court finds Defendant in violation.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-25-CIV-SMA

STEVEN HENRY ROBERTS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary
Department of Offender
Rehabilitation,

Respondent.

_____/

ORDER OF DISMISSAL

Steven Henry Roberts has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254, attacking his sentence of fifteen (15) years imposed by the Circuit Court of the Eleventh Judicial Circuit of Dade County, Florida on March 13, 1980. Roberts was sentenced following a probation revocation hearing.

Petitioner is currently in the custody of the Department of Offender Rehabilitation for the State of Florida.

As grounds for relief, the Petitioner alleges the following:

1. That his conviction was obtained by a guilty plea which was not made with knowledge of the consequences of the plea.

2. Denial of the effective assistance of counsel as his attorney was not afforded time to familiarize himself with the facts and the law of the case.

Petitoner was initially tried and convicted of rape in case number 74-1860. On appeal the Supreme Court of Florida reversed his conviction. Roberts v. State, 335 So.2d 285 (Fla. 1976). Upon remand to the trial court he entered a guilty plea to a charge of attempted rape and received a sentence of ten years probation on September 24, 1976.

On September 20, 1978, the Petitioner was charged with violations of the terms of his probation. Following a full hearing, during which he was represented by counsel, the Petitioner's probation was revoked and on March 13, 1980, he was given a fifteen (15) year sentence. Following the revocation of his probation and sentence, the Petitioner sought post conviction relief in the state trial court. He states that he raised the same grounds that he raises in the instant petition. That petition was denied in the state court on August 4, 1980. According to his federal petition, he then appealed from the state court order denying post-conviction relief. It appears that the Petitioner has complied with the exhaustion requirement of 28 U.S.C. §2254(b) in presenting his claims to the state appellate court. Picard v. Connor,

404 U.S. 270 (1971); Lamberti v. Wainwright, 513 F.2d 277 (1975).

Although the Petitioner claims that he pled guilty without knowledge of the consequences of his plea, his confinement is not the result of his plea of guilty. Rather the Petitioner received his fifteen year sentence following the revocation of his probation. He did not plead guilty to the charges of the probation violation affidavit, but rather was found guilty following a full hearing in the state trial court. At that hearing, he presented witnesses and evidence in his own defense. He was represented by counsel. (Respondent's Composite Exhibit D).

Therefore, this first contention of the Petitoner's is without merit. He has not alleged failure to comply with the minimal due process requirements for a revocation of probation. It appears that all of these due process requirements have

been met. Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 788 (1973). Therefore, his claim of an involuntary guilty plea entitles him to no relief.

Petitioner's second claim for relief is that he was denied the effective assistance of counsel because his attorney was not allowed enough time to become familar with the legal and factual issues of his case. Petitioner has not stated the manner in which he was prejudiced from this lack of time to prepare. This conclusory allegation of ineffectiveness of counsel without any affirmative demonstration of prejudice is insufficient to show ineffective assistance of counsel. See, United States v. Doran, 564 F.2d 1176 (5th Cir. 1977). Furthermore, the Fifth Circuit has determined that lack of time for preparation will not in itself support a claim of ineffective counsel. Cappetta v.

Wainwright, 443 F.2d 1027 (5th Cir. 1970). Petitioner is therefore entitled to no relief as to this claim.

For the foregoing reason, it is hereby

ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus is Denied.

DONE AND ORDERED at Miami, Florida, this ____ day of ___, 1981.

UNITED STATES DISTRICT JUDGE

CC: Steven H. Roberts, A-04449
P. O. Box 667-A-139
Bushnell, Florida 33513

Calvin L. Fox, Esquire
Asst. Attorney General
401 N.W. 2nd Avenue,
Suite 820
Miami, Florida 33128

Steven Henry ROBERTS, Petitioner,

v.

Louie L. WAINWRIGHT, Secretary of Florida Department of Correction and Rehabilitation and Etc., Respondent.

No. 81-5648

Non-Argument calendar.

United States Court of Appeals,

Eleventh Circuit.

Jan. 22, 1982.

Steven H. Roberts, pro se.

Calvin L. Fox, Asst.Atty.Gen., State of Fla., Miami, Fla., for respondent.

Appeal from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, JOHNSON and ANDERSON, Circuit Judges.

PER CURIAM:

Steven Roberts pleaded guilty to attempted rape. A Florida State court sentenced him to ten years' probation on condition that he be incarcerated for two and one-half years. After his release from incarceration, he was charged with

violating the terms of his probation. Following a full hearing, Robert's probation was revoked and he was sentenced to fifteen year's imprisonment.

Roberts subsequently filed a petition for habeas corpus pursuant to 28 U.S.C.A. §2254, alleging that his guilty plea to attempted rape was made without knowledge of the consequences of the plea and that he was denied effective assistance of counsel because counsel had insufficient time to familiarize himself with the facts and law of the case. The district court, proceeding upon the basis that appellant had exhausted state remedies, dismissed Roberts' petition.[1] Roberts' present incarceration, the court ruled, was the result not of his guilty plea to attempted

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[1] It is not at all clear that Roberts had in fact exhausted his state remedies as required by 28 U.S.C.A. §2254(b).

rape but of his violation of probation requirements. For that violation he did not plead guilty and was represented by counsel before a full hearing in state court. The district court held that Roberts' claim of an involuntary plea would, therefore, entitle him to no relief. Turning next to Roberts' claim that he was denied effective assistance of counsel, the court found that petitioner had not shown how he was prejudiced from his counsel's lack of time to prepare and ruled that his allegation of ineffective assistance was too conclusory to set out a claim for relief. The court, without a hearing, held that claim without merit.

On appeal, Roberts does not contest the lower court's dismissal of his claim that he entered a guilty plea without knowledge of the consequences. We consequently deem that claim abandoned. Red v. Blackburn, 636 F.2d 1027, 1028 (5th Cir. 1981).

We do, however, disagree with the district judge's conclusion that Roberts' claim of ineffective assistance was too conclusory to merit consideration. Initially, we observe that a court should interpret a pro se petition such as Roberts' more liberally than it might interpret a petition by an attorney. Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 595, 30 L.Ed.2d 652 (1971); Dupart v. United States, 541 F.2d 1148, 1150 (5th Cir. 1976); Haggard v. Alabama, 494 F.2d 1187 (5th Cir. 1974). Liberally interpreted, we believe that the petition set forth a claim for relief that warrants further judicial inquiry. Roberts contends that counsel was inadequately prepared to defend him. His charge, if confirmed by the totality of circumstances in the case, would be grounds for granting his petition. See Baty v. Balkcom, 661 F.2d 391 at 393-395 (5th Cir. 1981);

Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978). We note, moreover, that the cases the district court cites, United States v. Doran, 564 F.2d 1176, 1177-78 (5th Cir. 1977), cert. denied, 435 U.S. 928, 98 S.Ct. 1498, 55 L.Ed.2d 524 (1978), and Cappetta v. Wainwright, 433 F.2d 1027, 1029-30 (5th Cir. 1970), rejected claims of ineffective assistance only after an examination of the record disclosed no prejudice. Unlike the district court, they did not reject the petitioner's claim without consideration of its merits.

The district court on remand should determine whether Roberts has in fact exhausted his state remedies and so should be permitted to file a habeas corpus petition in federal court. See Bufalino v. Reno, 613 F.2d 568, 570 (5th Cir. 1980). If the court finds that Roberts has exhausted his state remedies, it should inquire into the merits of his claim of

ineffective assistance.[2] If no state record exists that is adequate for the federal district court to evaluate Roberts' claim,[3] that court should hold its own evidentiary hearing. See, e.g, Townsend

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[2] It is not altogether clear from Roberts petition whether he is claiming ineffective assistance by counsel's advising him to plead guilty to attempted rape or by counsel's representing him at his probation hearing. The precise nature of Roberts' claim should be developed on remand. We do not reach here the issue of whether a claim of ineffective assistance by counsel's advising him to plead guilty is moot because his confinement is not the result of his guilty plea but rather of his violation of probation. We observe, however, that we have held that federal courts have jurisdiction to hear habeas corpus petitions "if there is a positive, demonstrable relationship between the prior conviction and the petitioner's present incarceration." Sinclair v. Blackburn, 599 F.2d 673, 676 (5th Cir. 1979), cert. denied, 444 U.S. 1023, 100 S.Ct. 684, 62 L.Ed.2d 656 (1980); see also Escobedo v. Estelle, 655 F.2d 613, 614 (5th Cir. 1981).

[3] Roberts contends that he should have only the burden of showing possible lines of inquiry that counsel had he had more time might have pursued. If he meets that burden, Roberts asserts that there should be a rebuttable presumption of

v. Sain, 372 U.S. 293, 313, 83 S.Ct. 745, 757, 9 L.Ed.2d 770 (1963); Williams v. Blackburn, 649 F.2d 1029, 1021 (5th Cir. 1981); Burden v. Alabama, 584 F.2d 100, 102 (5th Cir. 1978).

The judgment of the district court is REVERSED and REMANDED for proceedings consistent with this opinion.

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prejudice. Such is not the law. The burden of proof for showing ineffective assistance of counsel is, and remains, on petitioner throughout a habeas corpus proceeding. See, e.g., Jones v. Estelle, 632 F.2d 490, 491, (5th Cir. 1980); Rhodes v. Estelle, 582 F.2d 972, 973 (5th Cir. 1978).

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

NO. 81-5648

STEVEN HENRY ROBERTS,

Petitioner-Appellant,

vs.

LOUIE L. WAINWRIGHT, Etc., Et. Al.,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING

Before GODBOLD, Chief Judge, FRANK M. JOHNSON, JR., and ANDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-5648

STEVEN HENRY ROBERTS,

Petitioner,

versus

LOUIE L. WAINWRIGHT, Secretary
of Florida Department of Correction
and Rehabilitation and ETC,

Respondent.

Appeal from the United States District
Court for the Southern District of Florida

O R D E R:

* * *

The motion of APPELLEE, LOUIE L. WAINWRIGHT for X stay ___recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk

of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.